

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN L. LYONS,)	
)	
Plaintiff)	
)	
v.)	Civil No. 95-0194-B
)	
JESSE BROWN, et al.,)	
)	
Defendants)	

***MEMORANDUM OF DECISION ON
THE FEDERAL DEFENDANTS' SECOND
MOTION TO DISMISS¹***

On March 19, 1997, the Government filed a Motion pursuant to the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(d)(1) [“The Westfall Act”], to substitute itself in the place of Defendant Nikhil J. Pathak as to conduct it certified occurred within the scope of Defendant Pathak’s employment. Both Plaintiff and Defendant Pathak objected to the Government’s Motion, and on August 1, 1997 this Court denied the Motion to Substitute. That Order was overturned by the First Circuit Court of Appeals, and this Court was directed to determine, with respect to discrete acts or incidents, whether the conduct alleged in Plaintiff’s Amended Complaint was properly “certified” under the

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Westfall Act. On remand, an evidentiary hearing was held and on September 21, 1999, this Court entered an Order supplementing the Government's Amended Scope Certification, filed March 24, 1997, by including several additional paragraphs of Plaintiff's Amended Complaint. On Defendant's Motion for Reconsideration, the Scope Certification was further amended by the addition of paragraph 111 of Plaintiff's Amended Complaint. Order, Dec. 15, 1999.

Now pending before the Court is the Government's Motion to Dismiss the state claims originally asserted against it, as well as any claims arising from those paragraphs included within the Scope Certification.

As a preliminary matter, the Government's Motion to substitute itself in the place of Defendant Pathak as to those paragraphs it had scope certified remains pending, and is hereby GRANTED. The Government is hereby substituted in the place of Defendant Pathak with respect to all paragraphs included in the scope certification as of December 15, 1999.²

In addition, Plaintiff agrees that her claims for negligent retention and supervision, Counts IX, X, and XI, are properly dismissed pursuant to *Brown v.*

² The Court takes no position on the question whether a motion to substitute party was necessary. The Westfall Act provides that "[u]pon certification . . . the United States *shall* be substituted as the party defendant." 28 U.S.C. § 2679(d)(1).

General Serv. Adm., 425 U.S. 820 (1976). The Motion to Dismiss is accordingly granted on these Counts.

The Government's pending Motion to Dismiss asserts several grounds for dismissal of the remainder of Plaintiff's claims, one of which is Plaintiff's failure to exhaust her administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ["FTCA"]. Plaintiff argues in response that the Government may only assert those defenses that would have been available to Defendant Pathak, and that it may not raise Federal Tort Claims Act defenses. The Court disagrees. The plain language of the Westfall Act states otherwise. Once an action is certified pursuant to section 2679(d)(1), it is to be treated as any brought pursuant to the FTCA, and it is "subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4); *see, Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) ("Under the terms of [the Westfall Act], the substitution of the United States leaves the plaintiff with a single avenue of recovery, the Federal Tort Claims Act.").

Plaintiff further argues that she nevertheless complied with the notice provisions of the FTCA by filing her Equal Employment Opportunity Commission complaint. Again, the Court disagrees. A proper notice of claim under the FTCA must be filed within 2 years of the date the cause of action accrued, and must include a claim for money damages in a sum certain. 28 C.F.R. § 14.2(a). This

requirement, while technical, is nonetheless jurisdictional. *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997) (citing *Kokaras v. United States*, 980 F.2d 20, 22 (1st Cir. 1992)). Plaintiff's February 13, 1995 "Complaint of Employment Discrimination" does not refer in any way to a claim arising under state tort law, and it does not include a claim for money damages in a sum certain. Even in the Fifth Circuit, where substantial compliance with the sum certain requirement has been held sufficient, the defendant agency must nevertheless have been given some notice of the amount, whether because of a prior state lawsuit, or through reference to estimates, invoices, or medical bills. *Martinez v. United States*, 728 F.2d 694, 697 (5th Cir. 1984) (citations omitted). In this case, Plaintiff sought only employment action against Defendant Pathak, and an apology.

The Court is also satisfied that the 2 year limitations period was not tolled by virtue of the prior proceedings in this action. Quite simply, the notice must have been filed within 2 years of the date the cause of action accrued. Even were the Court to consider that limitations period to have been equitably tolled, at best Plaintiff, who was represented by competent counsel, should have been aware of the need to file a proper notice in March, 1997, when the Government filed its first Scope Certification. *See, Glarner v. United States*, 30 F.3d 697, 702 (6th Cir. 1994) (discussing conditions that might warrant equitable tolling).

Conclusion

For the foregoing reasons, the Government's Motion to Dismiss Plaintiff's state claims against it is hereby GRANTED in its entirety.

SO ORDERED.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated on: February _____, 2000